IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 21, 2009

STATE OF TENNESSEE v. ERIC CONDRELL O'NEAL

Appeal from the Circuit Court for Marshall County
No. 17144 Robert Crigler, Judge

No. M2007-00097-CCA-R3-CD - Filed November 20, 2009

The Marshall County Grand Jury indicted Appellant, Eric Condrell O'Neal, for two counts of statutory rape. A jury found Appellant guilty as charged. The trial court sentenced Appellant to one year and nine months for each conviction to be served concurrently. The trial court denied alternative sentencing. Appellant now appeals arguing that the evidence was insufficient to support his convictions and that the trial court erred in denying alternative sentencing. We have reviewed the record and find that there is ample support for his convictions and the trial court's denial of alternative sentencing. Therefore, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

Hershell D. Koger, Pulaski, Tennessee, for the appellant, Eric Condrell O'Neal.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; Mike McCowen, District Attorney General, and Weakley E. Barnard, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

J.F.[1] was born August 25, 1990. In late 2005 and early 2006, J.F. was living with her grandmother. On October 22 or 23, 2005, around noon, J.F. left the house while her grandmother was sleeping and took her grandmother's car. J.F. did not have a driver's license and did not have permission to take the car. She rode around "the projects" which were about one mile from her

[1] It is the policy of this Court to refer to minor victims by their initials.

grandmother's house. J.F. was gone for twenty to twenty-five minutes. While driving around, she encountered Appellant in his car. She only knew Appellant by sight. J.F. and Appellant were driving in opposite directions and were driving past each other. When her car was level with his, he waved and she stopped the car. Their windows were down, and they began to talk. Appellant asked J.F. what her name was, and she told him. He asked J.F. how old she was and she told him she was seventeen years old. She did not ask how old he was. J.F. later learned that Appellant was twenty-seven years old. Appellant asked J.F. for her telephone number, but she refused to give it to him. Appellant gave J.F. two cellular telephone numbers and asked her to call him. J.F. left and returned to her grandmother's house.

J.F. called Appellant about three hours later, and they had a casual conversation. J.F. and Appellant spoke on the telephone several times between the day they met and November 18, 2005. J.F. placed all the telephone calls to Appellant. A couple of weeks into their friendship, Appellant told J.F. he was going to pick her up and take her to the Walking Horse Lodge. There was no discussion about having intercourse, but J.F. said she knew the purpose of going to the hotel. Appellant had a seventeen-year-old cousin who went to school with J.F. J.F. stated that the cousin knew how old she was at the time she was talking to Appellant.

On November 18, 2005, J.F. and Appellant spoke on the telephone, and they decided that Appellant would pick up J.F. at 10:30 p.m. and take her to the Walking Horse Lodge. They did not discuss why they were going, but J.F. stated that she understood why they were going. Appellant told J.F. he would pick her up down the street from her grandmother's house. When J.F. got in the car, Appellant told her to "lay low" and lean over in the seat so that no one could see her riding in his car. They went to the Walking Horse Lodge and went directly to the room by way of an outdoor staircase. They did not go inside the hotel lobby. Appellant had already registered. Appellant and J.F. had sexual intercourse. J.F. testified that there was penetration and Appellant "entered inside of [her]." Appellant used a condom. They remained in the room thirty minutes to an hour. They got dressed. Appellant drove J.F. back to her street and let her out down the street from her grandmother's house. Appellant once again told her to "lay low" in the car.

J.F. called Appellant several more times over the next few weeks. During that time, several people told Appellant that J.F. was fifteen years old. When Appellant confronted her, J.F. admitted that she was actually fifteen years old. They did not have any more meetings until January 3, 2006. They spoke on January 3 and Appellant told J.F. they were going back to the Walking Horse Lodge. They planned again for Appellant to pick up J.F. at 10:30 p.m. at the same place. Appellant told her to "lay low" in the car. J.F. agreed that there was no question as to why they were going to the Walking Horse Lodge. Appellant had already registered, and they went directly to the room. It was not the same room as the room in November. Appellant's belongings were already in the room. Appellant and J.F. had sexual intercourse and stayed in the room thirty minutes to an hour. They dressed, and Appellant drove J.F. back to her street. Once again, she understood to "lay low" in the car. On November 18, 2005 and January 3, 2006, J.F. was fifteen years old.

Detective Carol Jean, who was with the Lewisburg Police Department, received a call from another officer on January 7, 2006. As a result of the call, Detective Jean spoke with J.F.'s grandmother about some suspicions J.F.'s grandmother had. Detective Jean went to J.F.'s school on Monday. J.F.'s grandmother had requested that Detective Jean not disclose that the grandmother had asked her to speak with J.F. Detective Jean got J.F. out of class , and J.F. told Detective Jean about having intercourse with Appellant at the Walking Horse Lodge on November 18, 2005 and January 3, 2006. Detective Jean spoke with Mr. Hermant Desai, the general manager of the Walking Horse Lodge, and retrieved records showing that Appellant was registered to rooms during the evening on the two dates in question. Mr. Desai stated that he knows Appellant because he is often a guest at the hotel.

Detective Jean also spoke with Appellant about the incidents in question. His date of birth is December 17, 1978. Therefore, Appellant was more than four years older that J.F. even if she had been seventeen. Appellant told Detective Jean that J.F. had been calling him. Detective Jean testified that "[h]e denied having [a] sexual relationship [with J.F.]; knew this day was coming; his stomach had been in knots. He had kinfolks that knew this girl, went to school with her." He also told Detective Jean that J.F. had never been in the car with him and the closest he came to her was when she followed him into Walmart. Appellant told Detective Jean that J.F. had said she was eighteen years old.

In April 2006, the Marshall County Grand Jury indicted Appellant for two counts of statutory rape. On May 4, 2007, a jury trial was held. The jury found Appellant guilty of both counts of statutory rape. At a separate sentencing hearing held December 19, 2007, the trial court sentenced Appellant to one year and nine months for each charge as a Range I, standard offender, to be served concurrently. Appellant filed a timely notice of appeal.

ANALYSIS

Sufficiency of the Evidence

Appellant argues that the evidence was insufficient to support his convictions for statutory rape. The State argues that the evidence was sufficient.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the" State's witnesses and resolves all conflicts in the testimony in favor of the state. *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption "and replaces it with one of guilt." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. *Id.* The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn.

R. App. P. 13(e); *Harris*, 839 S.W.2d at 75. In making this decision, we are to accord the state "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." *See Tuggle*, 639 S.W.2d at 914. As such, this Court is precluded from reweighing or reconsidering the evidence when evaluating the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." *Matthews*, 805 S.W.2d at 779. Further, questions concerning the credibility of the witnesses and the weight and value to be given to evidence, as well as all factual issues raised by such evidence, are resolved by the trier of fact and not the appellate courts. *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990).

Appellant argues that there was no physical proof of penetration or that Appellant and J.F. were ever together. Essentially, Appellant argues that the only evidence of statutory rape was based upon the statements of the victim. The Court has previously stated that the testimony of a victim is sufficient evidence in and of itself to support a conviction. *State v. Strickland*, 885 S.W.2d 85, 87 (Tenn. Crim. App. 1993); *State v. Williams*, 623 S.W.2d 118, 120 (Tenn. Crim. App. 1981). The issue is whether the victim's testimony is credible. As stated above, the credibility of a witness is an issue to be determined by the jury. *Pruett*, 788 S.W.2d at 561. Clearly in the case at hand, the jury found J.F. to be a credible witness.

At the time Appellant committed the incidents in question, statutory rape was found at Tennessee Code Annotated section 39-13-506(a) (2003), and defined as, "[S]exual penetration of a victim by the defendant or of the defendant by the victim when the victim is at least thirteen (13) but less than eighteen (18) years of age and the defendant is at least four (4) years older than the victim."

Because the jury found the testimony of J.F. to be credible, the evidence when taken in a light most favorable to the State demonstrates that Appellant and J.F. had sexual intercourse on two occasions. J.F. was fifteen years old at the time, and Appellant was twenty-seven years old. Appellant was clearly more than four years older than J.F. at the time they had intercourse. The evidence is sufficient to support both convictions for statutory rape.

Therefore, this issue is without merit.

Sentencing

Appellant also argues that the trial court erred in refusing to order an entirely suspended sentence based upon his "social history." The State argues that the trial court properly denied an alternative sentence.

"When reviewing sentencing issues . . . , the appellate court shall conduct a *de novo* review on the record of the issues. The review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." T.C.A. §

40-35-401(d). "[T]he presumption of correctness 'is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.'" *State v. Carter*, 254 S.W.3d 335, 344-45 (Tenn. 2008) (quoting *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991)). "If . . . the trial court applies inappropriate mitigating and/or enhancement factors or otherwise fails to follow the Sentencing Act, the presumption of correctness fails." *Id.* at 345 (citing *State v. Shelton*, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992)). We are to also recognize that the defendant bears "the burden of demonstrating that the sentence is improper." *Ashby*, 823 S.W.2d at 169.

In making its sentencing determination, the trial court, at the conclusion of the sentencing hearing, first determines the range of sentence and then determines the specific sentence and the appropriate combination of sentencing alternatives by considering: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors; (6) any statistical information provided by the administrative office of the courts regarding sentences for similar offenses, (7) any statements the defendant wishes to make in the defendant's behalf about sentencing; and (8) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-210(a), (b), -103(5); *State v. Williams*, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995).

With regard to alternative sentencing, Tennessee Code Annotated section 40-35-102(5) provides as follows:

> In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration . . . .

A defendant who does not fall within this class of offenders "and who is an especially mitigated offender or standard offender convicted of a Class C, D, or E felony should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. A court shall consider, but is not bound by, this advisory sentencing guideline." T.C.A. § 40-35-102(6); *see also State v. Carter*, 254 S.W.3d 335, 347 (Tenn. 2008). Furthermore, with regard to probation, a defendant whose sentence is ten years or less is eligible for probation. T.C.A. § 40-35-303(a).

However, all offenders who meet the criteria for alternative sentencing are not entitled to relief; instead, sentencing issues must be determined by the facts and circumstances of each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987) (citing *State v. Moss*, 727 S.W.2d

229, 235 (Tenn. 1986)). Even if a defendant is a favorable candidate for alternative sentencing under Tennessee Code Annotated section 40-35-102(6), a trial court may deny an alternative sentence because:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant . . . .

T.C.A. § 40-35-103(1)(A)-(C). In choosing among possible sentencing alternatives, the trial court should also consider Tennessee Code Annotated section 40-35-103(5), which states, in pertinent part, "[t]he potential or lack of potential for the rehabilitation or treatment of a defendant should be considered in determining the sentence alternative or length of a term to be imposed." T.C.A. § 40-35-103(5); *State v. Dowdy*, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). The trial court may consider a defendant's untruthfulness and lack of candor as they relate to the potential for rehabilitation. *See State v. Nunley*, 22 S.W.3d 282, 289 (Tenn. Crim. App. 1999); *see also State v. Bunch*, 646 S.W.2d 158, 160-61 (Tenn. 1983); *State v. Zeolia*, 928 S.W.2d 457, 463 (Tenn. Crim. App. 1996); *State v. Williamson*, 919 S.W.2d 69, 84 (Tenn. Crim. App. 1995); *Dowdy*, 894 S.W.2d at 305-06.

Appellant herein was convicted of two counts of a Class E felony and sentenced to fewer than ten years. Therefore, he is eligible for alternative sentencing including probation. *See* T.C.A. §§ 40-35-102(6) & -303(a). However, we point out that the above considerations are advisory only according to statute. *See* T.C.A. § 40-35-102(6).

We have reviewed the record on appeal and find that the trial court considered the sentencing principles and all pertinent facts in the case; therefore, there is a presumption of correctness in the findings of the trial court.

The trial court stated that it was going to deny alternative sentencing because of Appellant's "social history" and because "more importantly, less restrictive measures than confinement have frequently and recently been applied unsuccessfully to the defendant." Appellant's Presentencing Report shows that at the time he committed the instant offense he was on probation for a robbery conviction. He also had a previous sentence for possession of drugs where he had been placed on probation a little over one year before committing the robbery. In addition, Appellant had four suspended sentences between 1997 and 2003. During that time, he was also convicted for aggravated assault and sentenced to three years which was not suspended or served under probation. It is clear that Appellant has been given alternative sentences in the past, but these chances have not

produced an effect of lessening his criminal activity. Therefore, we conclude that there is ample support for the trial court's denial of alternative sentencing based upon previous attempts at alternative sentencing.

This issue is without merit.

CONCLUSION

For the foregoing reasons, we affirm the judgments of the trial court.

JERRY L. SMITH, JUDGE